No. 87-894

In the Supreme Court of the United States

OCTOBER TERM, 1987

ARNOLD H. SLYPER AND MARCO BAQUERO, PETITIONERS

v.

ATTORNEY GENERAL AND DIRECTOR,
UNITED STATES INFORMATION AGENCY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the decision of the United States Information Agency (USIA) to recommend against waiver of the two-year foreign residence requirement – which, under 8 U.S.C. (Supp. IV) 1182(e), foreign doctors in this country for graduate medical training must satisfy before applying for lawful permanent resident status – is subject to judicial review.

2. Whether Congress intended that requests by foreign doctors for waiver of the two-year foreign residence requirement be granted sparingly.

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OPINIONS BELOW

The decision of the court of appeals (Pet. App. 36-42) is reported at 827 F.2d 821. The decisions of the district courts in *Slyper* v. *Attorney General* (Pet. App. 43-49) and *Baquero* v. *Attorney General* (J.A. 63-65)[1] are unreported. A related district court decision in *Slyper* v. *Attorney General* is reported at 576 F.Supp. 559.

JURISDICTION

The judgment of the court of appeals was entered on September 4, 1987. The petition for a writ of certiorari was filed on November 18, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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[1] "J.A." refers to the joint appendix filed in the court of appeals.

STATEMENT

A. *Statutory and Regulatory Background*

Section 212(e) of the Immigration and Nationality Act, 8 U.S.C. (Supp. IV) 1182(e), provides that an alien exchange visitor who has come to the United States to receive graduate medical education or training is ineligible to apply for an immigrant visa or for lawful permanent resident status unless (1) he "has resided and been physically present in the country of his nationality or his last residence for an aggregate of at least two years following departure from the United States" or (2) he obtains a waiver of the two-year foreign residence requirement from the Attorney General. 8 U.S.C. (Supp. IV) 1182(e). One type of waiver that may be obtained is a "hardship" waiver.[2] Before the Attorney General may grant such a waiver, three requirements must be met. First, the Immigration and Naturalization Service (INS) must find that the alien's compliance with the two-year foreign residence requirement "would impose exceptional hardship upon [his] spouse or child (if such spouse or child is a citizen of the United States or a lawfully resident alien)" (*ibid.*). Second, the Director of the United States Information Agency (USIA) must make a "favorable recommendation" concerning the waiver (*ibid.*). Finally, the Attorney General must find that the admission of the alien into the United States is "in the public interest" (*ibid.*).

The present case centers around the USIA's role in the waiver process. Although Section 1182(e) requires the USIA's favorable recommendation as a prerequisite to a

[2] Waivers may also be granted if an interested federal agency requests one or if "the alien cannot return to the country of his nationality or last residence because he would be subject to persecution on account of race, religion, or political opinion" (8 U.S.C. (Supp. IV) 1182(e)). Petitioners made no attempt to seek a waiver on these alternative bases.

waiver, it does not identify any criteria to be applied by the USIA in making its recommendation. The USIA's regulations reiterate, essentially verbatim, the waiver procedure outlined in Section 1182(e) (see 22 C.F.R. 514.31). In addition, they provide that when the USIA receives a request for a recommendation concerning a waiver of the two-year foreign residence requirement, the Director "will review the program, policy and foreign relations aspects of the case" and will transmit a recommendation to the Attorney General for decision (22 C.F.R. 514.32(a) and (b)). The regulations contain no further criteria to be applied by the USIA in deciding whether to recommend a waiver.

B. *The Present Controversy*

1. This case involves two foreign medical graduate students who have been in this country under the Exchange Visitor Program (see 22 U.S.C. (& Supp. IV) 2452) and who now seek to obtain lawful permanent resident status. Petitioner Arnold Slyper, a citizen of the United Kingdom, entered the United States in July 1979 to pursue a program of graduate medical training. In May 1980, he married an American citizen. Pet. App. 37-38; J.A. 8, 18. Seven months later, Slyper filed applications with the INS for permanent resident status and for a waiver of the two-year foreign residence requirement. The INS determined that no exceptional hardship to Slyper's wife would result if he were required to return to the United Kingdom for two years. It therefore denied Slyper's request for a waiver. Pet. App. 45; J.A. 18.

Slyper then filed suit in the U.S. District Court for the District of Columbia challenging the INS determination. The court held that Slyper had established exceptional hardship to his wife. Accordingly, it remanded the case to the INS for further proceedings. Pet. App. 45; J.A. 18;

Slyper v. *Attorney General*, 576 F. Supp. 559 (D.D.C. 1983). The INS thereafter forwarded Slyper's waiver application and a copy of the district court's opinion to the USIA with a request for a recommendation as to whether a waiver should be granted. In May 1984, the USIA returned the request form to the INS with an unfavorable recommendation. After noting that the INS had not itself made a hardship finding, the USIA stated (J.A. 16):

> It is considered that what hardship may exist does not outweigh the program and policy considerations of the Exchange Visitor Program or the Congressional intent of Public Law 94-484.

In June 1984, the INS again denied petitioner Slyper's request for a waiver, this time because of the USIA's unfavorable recommendation (J.A. 19). The USIA later declined Slyper's request that it reconsider its unfavorable recommendation (J.A 22).

In November 1984, Slyper obtained permission from the district court to file an amended complaint joining the USIA as a defendant in his case (J.A. 3). The USIA moved to dismiss the complaint, arguing that the court lacked subject-matter jurisdiction to review the USIA's unfavorable recommendation because such a decision is committed to agency discretion by law under 5 U.S.C. 701(a)(2). The district court granted the motion and dismissed the case on March 26, 1986 (Pet. App. 43-49). The court noted that 8 U.S.C. 1182(e) "contains no standards or criteria upon which the Director of the USIA is to base his recommendation or his failure to make a recommendation" (Pet. App. 46-47 (footnote omitted)). Rather, that provision "vests the widest possible discretion in the USIA with respect to recommendation regarding physician nonimmigrants" (*id.* at 48). The court indicated that "[t]he legislative history does not supply such standards

nor does it indicate that the statute was to be construed to provide for leniency in favor of individuals in [Slyper's] category" (*id.* at 47 n.3). The court also pointed out that "foreign physicians are the only professional group singled out by Congress as having to promise that they would return home for at least a two-year period" (*ibid.* (citations omitted)).

2. Petitioner Marco Baquero is a citizen of Ecuador who entered the United States in July 1980 as a temporary visitor. A year later, he was accepted into the Exchange Visitor Program for graduate medical training. In 1983, during his medical training, he married an American citizen. J.A. 27. In November 1984, Baquero applied to the INS for a waiver of the two-year foreign residence requirement based on alleged exceptional hardship to his wife (J.A. 29). The INS agreed that exceptional hardship would result from Baquero's compliance with the two-year requirement, and it therefore forwarded the case to the USIA for a recommendation on the waiver application (J.A. 64). The USIA subsequently returned the form to the INS, stating that it was making an unfavorable recommendation because (J.A. 60):

> The USIA has determined that the program and policy considerations of the Exchange-Visitor Program outweigh the hardship alleged for the American citizen spouse.

In August 1985, the INS denied the waiver application on the basis of the USIA's recommendation (J.A. 61).

Baquero subsequently filed suit in the U.S. District Court for the District of Columbia. On March 27, 1986, the district court dismissed the complaint sua sponte, holding that Baquero's claim was essentially the same as Slyper's, which the court had dismissed the previous day (J.A. 63-65).

3. Both Slyper and Baquero filed appeals. The court of appeals consolidated the two appeals and affirmed in both cases (Pet. App. 36-42). The court noted (*id.* at 40) that "[i]t is clear from the face of the statute [8 U.S.C. 1182(e)] that Congress intended to vest maximum discretion in the Director to oppose waivers requested by visiting physicians." The court stated that "[t]he statute contains no standard or criterion upon which the Director is to base a decision to make or withhold a favorable recommendation" (Pet. App. 40). Likewise, the court noted, the applicable regulation is "equally devoid of meaningful direction" (*id.* at 42). Accordingly, the court concluded that the "broad delegation of discretionary authority" constituted " 'clear and convincing evidence' of congressional intent" sufficient to overcome the usual presumption in favor of judicial review (*id.* at 40, citing *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 141 (1967)).

ARGUMENT

1. Petitioners contend (Pet. 17-26, 29-33) that the court of appeals erred in holding that the district court lacked subject-matter jurisdiction to review petitioners' claim that the USIA abused its discretion in recommending against a waiver of the two-year foreign residence requirement.[3] According to petitioners (Pet. 21-22), review is appropriate, even in the absence of specific statutory guidelines, because the USIA "is performing a discretionary function in considering waiver applications" (*ibid.*). These contentions lack merit and do not warrant further review.

[3] A similar argument is made in an amicus brief filed by the American Immigration Lawyers Association (AILA Br. 4-19).

Under Section 702 of the Administrative Procedure Act (APA), 5 U.S.C. (Supp. IV) 702, a person "adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." Section 701(a) of the APA, however, imposes two limitations on judicial review—*i.e.*, when the statute "preclude[s] judicial review" (5 U.S.C. 701(a)(1)) and when "agency action is committed to agency discretion by law" (5 U.S.C. 701(a)(2)). See generally *NLRB* v. *United Food & Commercial Workers Union*, No. 86-594 (Dec. 14, 1987), slip op. 17; *Heckler* v. *Chaney*, 470 U.S. 821, 828, 830 (1985); *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 410 (1971). The exception to judicial review for action committed to agency discretion by law, which was the one relied upon by the courts below (Pet. App. 40-42, 47), applies "if the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." *Chaney*, 470 U.S. at 830; see also *Citizens to Preserve Overton Park*, 401 U.S. at 410 (citation omitted) (noting that 5 U.S.C. 701(a)(2) applies "in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply' ").

As the court of appeals noted, the provision at issue here—8 U.S.C. (Supp. IV) 1182(e)—presents a "classic case of a statute that 'is drawn so that the court would have no meaningful standard against which to judge the agency's exercise of discretion' " (Pet. App. 41-42 (quoting *Chaney*, 470 U.S. at 830)). Section 1182(e) provides that the Attorney General may waive the two-year foreign residence requirement only "upon the favorable recommendation of the United States Information Agency." There is no specification of the criteria to be applied by the

USIA in making its recommendation. Similarly, the USIA's regulations contain no criteria that could form the basis for judicial review. Rather, they merely provide that the Director of the USIA shall review waiver applications in light of unspecified "program, policy and foreign relations aspects of the case" (22 C.F.R. 514.32(a)).[4]

Numerous courts have held that the USIA's recommendation on whether the two-year foreign residence requirement should be waived is not subject to judicial review for abuse of discretion. See, *e.g.*, *Dina* v. *Attorney General*, 793 F.2d 473, 476-477 (2d Cir. 1986) (noting that 8 U.S.C. 1182(e) is "entirely bereft of any guiding principles by which the USIA's action may subsequently be judged"); *Abdelhamid* v. *Ilchert*, 774 F.2d 1447, 1449-1450 (9th Cir. 1985) (holding that 8 U.S.C. 1182(e) places no limits on the USIA's discretion and that the applicable regulation, 22 C.F.R. 514.32, likewise "raises no legal issues for review"); see also *Nwankpa* v. *Kissinger*, 376 F. Supp. 122 (M.D. Ala. 1974), aff'd mem., 506 F.2d 1054 (5th Cir. 1975); see generally *Chong* v. *Director, USIA*, 821 F.2d

[4] AILA erroneously claims (AILA Br. 13) that the court of appeals applied the presumption of *un*reviewability applicable to decisions not to take enforcement action (see *Heckler* v. *Chaney, supra*). In fact, the court of appeals applied a presumption *in favor* of judicial review but held that the presumption had been overcome here (see Pet. App. 40). See generally *Block* v. *Community Nutrition Institute*, 467 U.S. 340, 349 (1984) (noting that presumption in favor of judicial review may be overcome by statutory language or legislative history).

Similarly, petitioners err in contending (Pet. 19-21) that the applicable criteria for judicial review can be found in 8 U.S.C. (& Supp. IV) 1182(a). That provision simply lists 33 categories of aliens who, in general, are excludable from the United States and ineligible for visas. Nothing in Section 1182 suggests that, merely because an alien is not statutorily excludable or ineligible for a visa, he is therefore entitled to a favorable recommendation by the USIA under Section 1182(e).

171, 176 (3d Cir. 1987) (citing numerous district court cases so holding).[5]

Petitioners (Pet. 18, 23) and AILA (AILA Br. 20) contend that review should be granted because of a purported conflict between the present case and the Third Circuit's decision in *Chong* v. *Director, USIA, supra*. However, while *Chong* contains some conflicting language, the Third Circuit's analysis demonstrates that the claims raised by petitioners would be summarily rejected under the exceedingly narrow scope of review adopted by that circuit. Thus, any possible conflict between *Chong* and the decision below is not fairly presented by the facts of this case.

In *Chong*, the court recognized a "severely limited" scope of judicial review limited to the question "whether the USIA followed its own guidelines"—*i.e.*, whether the agency "determine[d] the policy, program, and foreign relations aspects of a case, weigh[ed] them against the hardship determined by the INS and [made] a favorable recommendation for waiver if the hardship clearly outweighs the other aspects" (821 F.2d at 176 (footnote omitted)). The court then applied that limited standard of review to the USIA's decision at issue, in which an unfavorable recommendation had been made for the following reason: " 'It is not felt the hardship outweighs the intent of Public Law 94-484. The letter that Dr. Chong provided does not con-

[5] In *Silverman* v. *Rogers*, 437 F.2d 102 (1970), cert. denied, 402 U.S. 983 (1971), the First Circuit took jurisdiction to resolve a question of statutory construction and to review an alleged constitutional violation. The court construed a prior version of 8 U.S.C. 1182(e) as giving the Secretary of State (now the USIA Director) a "veto" over hardship waiver applications. While the court reviewed—and rejected—the constitutional claim presented, it did not review the unfavorable recommendation for abuse of discretion. Instead, it ordered that the complaint be dismissed. 437 F.2d at 107.

clusively prove that he will not be able to practice medicine' " (821 F.2d at 177 (quoting USIA decision)). The Third Circuit found the USIA's explanation fully adequate because it "indicate[d] that the USIA 'review[ed] the policy, program, and foreign relations aspects of the case' " (*ibid.* (quoting 22 C.F.R. 514.32)). According to the court, "[t]hat is all that is required by the USIA's regulations" (821 F.2d at 177). The court expressly rejected Chong's argument that a "more particularized" statement of reasons was required (*ibid.*).

In the present case, the reasons given by the USIA for its unfavorable recommendations are essentially the same as the reasons found adequate by the court in *Chong*. And the arguments rejected in *Chong* are basically no different than those raised by petitioner here. Specifically, petitioners contend that the USIA improperly "refused to specify what 'program and policy consuderations' [*sic*] it has relied on in these and in all cases" (Pet. 31). Without such a decision, they argue, "the court and the affected applicants are left in the dark, and the court cannot determine whether an abuse of discretion has occurred" (*ibid.*). Under the analysis adopted in *Chong* (821 F.2d at 176-177), these arguments clearly do not provide a basis for overturning the USIA's unfavorable recommendation.

Moreover, while it is true that the Third Circuit in *Chong* left open some area for judicial review, the D.C. Circuit has done so as well. Thus, the court below recognized that decisions of the USIA are subject to judicial review " '[i]f a colorable claim [is] made of constitutional, statutory, or regulatory violation, or of fraud or lack of jurisdiction on the part of USIA' " (Pet. App. 40 (quoting government's brief)). Accord, *Dina*, 793 F.2d at 476-477; *Abdelhamid*, 774 F.2d at 1450. Since the judicial review recognized by the Third Circuit is limited to

whether the USIA followed its regulations (*Chong*, 821 F.2d at 176-177), and since a claim that the USIA violated its regulations—a claim not made here—is not precluded under the decision below, it is anything but clear whether there is *any* conflict between the present case and *Chong*. But in any event, as noted, there is clearly no conflict with respect to the abuse of discretion claims raised by petitioners here. In short, petitioners would have fared no better in the Third Circuit than in the Second, Ninth, or D.C. Circuits.[6]

2. Petitioners also claim that the USIA "misread the statute and the legislative purpose" in determining that Congress intended that waiver applications by foreign doctors "be dealt with more severely than similar applications by other exchange visitors" (Pet. 29). In fact, however, to the extent that the USIA treats foreign doctors more severely than other exchange visitors, such treatment is fully consistent with Congress's intent.

Section 1182(e) was added to the Immigration and Nationality Act in 1961 (Mutual Educational and Cultural Exchange Act, Pub. L. No. 87-256, § 109(c), 75 Stat. 535). The original statute contained a blanket two-year foreign residence requirement for all exchange visitors, and established the current three-step process for obtaining a waiver. In 1970, Congress liberalized the statute to require

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[6] In claiming an inter-circuit conflict, petitioners (Pet. 23-24) and AILA (AILA Br. 20, 22) also rely on Judge Oakes's concurring opinion in the Second Circuit's *Dina* decision. But that opinion was not adopted by the other judges on the panel, and it is therefore not the law in that circuit. In any event, the scope of review proposed by Judge Oakes, like that in *Chong*, is extremely narrow (see 793 F.2d at 477-478). Judge Oakes rejected the alien's claim—echoed by petitioners here—that the USIA abused its discretion by offering only a conclusory statement that it had balanced the hardship against the program, policy and foreign relations aspects of the case (*ibid.*).

two years of foreign residency only of persons whose participation in the program was financed by the United States or the visitor's home country or those whose home country needed their services (Immigration and Nationality Act Amendments, Pub. L. No. 91-225, § 2, 84 Stat. 116).

In 1976, Congress recognized that there was an increasing influx of immigrant doctors in this country, a majority of whom had entered as postgraduate trainees under the Exchange Visitor Program. That influx concerned many other nations, which were losing a number of their most talented doctors. See H.R. Rep. 94-266, 94th Cong., 1st Sess. 50 (1975). Moreover, Congress determined that by 1976 there was no longer an insufficient number of doctors in this country and, accordingly, that there was no need to give preference to alien physicians (see Health Professions Educational Assistance Act of 1976, Pub. L. No. 94-484, § 2(c), 90 Stat. 2243). Thus, Congress passed legislation imposing substantial restrictions on doctors who entered this country as exchange visitors. For example, the statute requires such doctors to return to their country upon completing their training (8 U.S.C. 1182(j)(1)(C)). And it requires a written statement from the home country, before the medical student enters the country for training, that it needs the skills to be acquired by the visitor (*ibid.*). In 1981, Congress added further restrictive measures applicable to foreign exchange doctors. See, *e.g.*, 8 U.S.C. 1182(j)(1)(E) (foreign exchange doctor must submit, on an annual basis, an affidavit to the Attorney General representing that he will return to his home country upon completion of the training program); 8 U.S.C. 1254(f)(2) (making such doctors ineligible for suspension of deportation). Congress added these provisions in part because of "the flagrant abuse of the exchange program during the

past decade" (H.R. Rep. 97-264, 97th Cong., 1st Sess. 16 (1981)).

As the Third Circuit noted in *Chong*, in both 1976 and 1981, "Congress singled out this group of exchange visitors—physicians—and imposed harsher restrictions on their ability to remain in the United State after they complete their studies than have been imposed on any other group" (821 F.2d at 179 (footnote omitted)). Thus, as the Third Circuit concluded, it is clear that Congress "intended that waivers [to exchange-visitor doctors] not be granted leniently" (*ibid.*). Accord, *Newton* v. *INS*, 736 F.2d 336, 341 (6th Cir. 1984). Petitioners' contrary claim (Pet. 29), which is unsupported by any court decision or statutory provision, does not merit further review.[7]

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[7] Also without merit is petitioners' claim (Pet. 33-34) that their due process rights were violated. To begin with, as the court of appeals recognized (Pet. App. 40), petitioners' complaints did not allege a constitutional violation. The only allegation was that the USIA's actions were "arbitrary, unreasonable, and an abuse of discretion" (see J.A. 12, 31). Petitioners rely on references to due process in their court of appeals briefs (Pet. 33), but they cite nothing to show that a constitutional claim was raised in the district court. In any event, their claim lacks merit. The statute provides no "process" that the USIA must afford a waiver applicant. The USIA receives each case from the INS, makes its own investigation and analysis, and responds directly to the INS. See 22 C.F.R. 514.31(b), 514.32(a) and (b). Neither the statute nor the governing regulations have any provision for a waiver applicant to make any submission directly to the USIA or for the USIA to communicate with the waiver applicant. Nor is there any requirement that the USIA provide a statement of its reasons. Moreover, as explained above, the USIA's decision whether to recommend in favor of a waiver is entirely discretionary; an applicant has no entitlement to a favorable recommendation. For these reasons, there is no merit in petitioners' belated constitutional claims.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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